

## THE PROBLEM OF FACT-FINDING IN PRELIMINARY PROCEEDINGS UNDER ARTICLE 177 EEC

D.A.O. Edward, QC\*

The papers submitted to the Colloquium show a surprising measure of agreement about the problems experienced by national lawyers in applying Article 177 of the EEC Treaty. Most of the problems appear to relate in one way or another to fact-finding. This is surprising in the sense that preoccupation with fact-finding is often said to be characteristic of the common law and Danish systems, and a point of difference between them and the mainstream civil law systems. But here, in relation to Article 177, the same questions crop up again and again in the national reports: Does the national court state the facts adequately for the Court of Justice? Should the national court delay making a reference until the essential facts have been ascertained? Should the reference be delayed until the case reaches a higher court which will be better able to judge whether the facts really raise a 'question' at all? Should the Court of Justice embark on an independent exercise of fact-finding and, if so, how (by asking questions in writing or at the oral hearing, by studying the court file of the national court, by hearing experts, etc.)? If the Court of Justice does embark on an independent fact-finding exercise, is it necessary to provide some sort of 'contradictory procedure' so that the version of the facts given by one party can be challenged by others? Should the Court of Justice reformulate the questions submitted by the national court in order to limit the scope of the answer to the circumstances of the particular case?

All these questions raise, directly or indirectly, the problem of establishing, in any particular case, the relationship between the law and the facts — a problem which underlies the activities of most courts most of the time. If the same questions are asked in relation to Article 177 by lawyers from different countries, with different systems and different traditions, it is worth asking whether this is because there is something inherent in Article 177 which is bound to give rise to these problems? Can the difficulties in applying Article 177 be traced to the underlying theory on which it is based? If so, is it possible to find a workable solution?

The underlying theory of Article 177 is that Community law can be stated by the Court of Justice *in abstracto*. This makes it possible to maintain a theoretical line of demarcation between the functions of the Court of Justice (to state the law) and the national court (to apply the law to the facts of the particular case). It also avoids any suggestion that the Court of Justice is 'superior' in the hierarchy of courts to the national court. The Court of Justice is not

\* Director of the Centre of European Governmental Studies, University of Edinburgh.

to be seen as a superior court or an appeal court, but rather as sort of judicial data base for the national court. The Court of Justice can work with a court at any level of the national judicial hierarchy and they complement each other in the complex process of finding the law and applying it to the facts.

There is no doubt that this theory has considerable value in avoiding tensions which might otherwise exist between the Court of Justice and the national courts. It is significant that when the European Parliament proposed (in its Draft Treaty on European Union, Article 43) that there should be a right of appeal to the Court of Justice against a refusal by a national court to make a reference, this was criticized as likely to upset the delicate relationship between the Court of Justice and the national courts. So it is important to maintain the concept of judicial collaboration based, if possible, on the theoretical demarcation of functions.

It is also true that the national legal systems themselves accept the theory that there is a real and workable distinction between 'the law' on the one hand and its application to the facts on the other. 'The law' is seen as existing independently of, and external to, the judge, the parties and the facts. The distinction between the general law and its application to particular facts is most obviously reflected in the syllogistic form of judgment where the major premise is the law and the minor the facts. But in one way or another, it appears in many features of national court systems, especially in the procedures for cassation or quashing of decisions of inferior courts on grounds of error of law.

In Community law, the idea that 'the law' has an external and independent character is reflected in Article 164 EEC ('The Court of Justice shall ensure that the law is observed'), and it is perfectly understandable that Article 177 should proceed on this hypothesis.

In practice, however, few (if any) national systems actually require the judge to state the law *in abstracto* without any reference to the factual context in which the law has to be stated. At the stage of judgment the law and the facts come together. The major and minor premises are parts of the same syllogism and can be written and read together. The judgment of a superior court can, if necessary, be read and interpreted in the light of the judgment of the lower court in which the facts have been examined in greater detail. Where the law has been stated too widely, the statement of the law can be interpreted in its factual context in order to apply it to (or distinguish it from) the facts of a new case.

In Article 177 proceedings the Court of Justice is supposed to operate in a sort of factless vacuum. This *may* have been possible at an early stage when the broad principles of Community law were still undecided: Does the Treaty confer rights on individuals which the national courts must protect? Does Article 52 have direct effect after the end of the transitional period? and so on. But that stage has passed in all but a very few cases. The great majority of Article 177 references raise questions which are almost meaningless without reference to their factual context. Moreover, even if an abstract question can be formulated, there is a danger that the abstract answer will be too widely stated,

or stated unsatisfactorily, so that it cannot be applied as it stands to the case in hand or to the circumstances of a new case.

Experience shows that ascertainment of the relevant facts has become as necessary to the work of the Court of Justice as it is to the work of other courts. The Court *does* investigate facts because, for practical reasons, it must do so if it is to do its job efficiently and avoid unnecessary delay. Also, as the *Foglia* cases<sup>1</sup> show, the Court is sometimes concerned with the factual background in order to assess its own jurisdiction. (In those cases, however, it might have been simpler to ask whether the Italian court had jurisdiction to try the alleged 'questions' in the first place).

If, in reality, the Court of Justice cannot escape issues of fact, should the procedure for references under Article 177 not recognize this explicitly? The lack of an established procedure for fact-finding has dangers of its own since there are no procedural safeguards either.

Procedural safeguards against inadequate or arbitrary fact-finding are found in all the national systems. They are important for two reasons — or perhaps for one reason which has two aspects: they give a guarantee to the litigant and impose a discipline on the court. Adequate and accurate ascertainment of the facts ensures that justice is seen to be done, that it is done efficiently, and that the time of the courts is not wasted on theoretical disputes.

However, the legal systems of the Member States differ considerably in the way in which they approach fact-finding and the type of procedural safeguards they adopt. In terms of their purpose (fairness), the 'adversary procedure' of the common law systems and the 'contradictory procedure' of the civil law systems may be comparable. In terms of the methods they adopt, they are not — notably in relation to the use of oral examination and cross-examination as an aid to the discovery of truth, and the extent to which factual questions are left to the 'free appreciation of the judge'.

The need to provide procedural safeguards in relation to fact-finding under Article 177 raises two difficulties which may push in opposite directions. On the one hand, if procedural safeguards are a necessary element in the administration of justice, there must first be a procedure in which the safeguards can operate. Therefore, if the Court of Justice is to engage in fact-finding, a recognized procedure should be established. On the other hand, given the differences in the national legal systems, it may be impossible to devise a satisfactory uniform procedure to be adopted in all cases. If the Court of Justice is to 'collaborate' with the national court, its procedure must take account of the methods by which, and the restraints under which, the national court is required to operate. On this view, it is better for the Court to approach the problem of fact-finding in the way most appropriate to the circumstances of each case, including the judicial methods of the Member State from which it comes.

1. Case 104/79, Judgment of 11 March 1980, (1980) E.C.R. 745 and Case 244/80, Judgment of 16 December 1981, (1981) E.C.R. 3045.

Adoption of a uniform procedure could be at best clumsy and at worst counter-productive in terms both of result and of safeguards.

At the least, it seems to be desirable that, when making a reference to the Court of Justice, the national court should be required to provide a statement of the factual context in which the 'question' arises. This need not be a definitive statement of the facts found by the court making the reference. It would be possible, in appropriate cases, to say 'For the purposes of this reference, the Court of Justice is asked to assume the following facts . . .'. This would leave open the possibility of making a reference at an early stage in the case.

A requirement to provide a statement of facts could have a number of useful consequences. It would force the national court to consider more carefully whether, and if so why, 'a decision on the question is *necessary*'. This might cut down the number of unnecessary references and diminish the growing case-load of the Court. It would also make it more difficult for the national court to overload the reference with a series of hypothetical questions and help it to focus more precisely the question to which an answer is sought. This could, for the same reason, make it less necessary for the Court of Justice to reformulate the questions before giving an answer.

It might also be helpful if the Court were to issue informal 'guidelines' for national courts. Informal guidelines could be adapted, in a way that a formal procedure could not, to the differences in judicial method between the Member States. Is there, for example, any reason why the Court should not recognize explicitly that the judge has greater control of the case, and a more active rôle in the procedure, in Germany than in some other countries? Indeed, it may be relevant to ask whether the fact that more references under Article 177 come from Germany than from any other Member State is due to the procedure being better adapted to German judicial methods than to others.

If, nevertheless, the Court will be forced to an increasing extent to become involved in fact-finding, what sort of procedure should it adopt? There seems to be a strong body of opinion in favour of a more formal 'contradictory procedure' which would allow the parties and the Member States to comment in writing, before the oral hearing, on statements made in other pleadings. Further scope for written pleading would create the risk of prolonging Article 177 proceedings. Against that, however, must be set the risk (which appears from some of the national reports to be a real risk) that a party may go away from the Court of Justice feeling that he has not had justice — or at any rate, that justice has not been seen to be done. It should be remembered that, for the lawyer advising the private client, it is very difficult to explain why a court has reached a decision on an erroneous basis of fact which could have been corrected if the opportunity had been given. It is important that the Court of Justice should recognize the problems of the lawyer representing private clients before it.

Indeed, it may be dangerous to place too much emphasis on Article 177 procedure as a 'dialogue between courts' if it comes to be seen as a 'dialogue between public authorities' (the judiciary, Community institutions and governments) from which the ordinary citizen and his advocate feel themselves

to be excluded. If the ideals of *Van Gend en Loos*<sup>2</sup> are to be maintained and Community law is genuinely to be law for the individual citizen, it may be necessary to make some sacrifices in efficiency and speed to make that clear.

2. Case 26/62, Judgment of 5 February 1963, (1963) E.C.R. 1.